88-2001

Supreme Court, U.S.
FILED
MAY 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RANDALL SILVER and MIKALA SILVER, individually and as parents and next of kin of MICHAEL R. SILVER, Deceased, minor child,

Petitioners,

vs.

FARMERS AND MERCHANTS INSURANCE COMPANY,

Respondent.

**CORRECTED**

# APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## VOLUME I - APPENDICES A - D

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# APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| RANDALL SILVER and MIKALA SILVER, individually, parents and next of kin of Michael R. Silver, deceased, minor child, | ) | |
| Plaintiffs-Appellants, | ) | |
| vs. | ) | No. 64,879 |
| CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO., | ) | FOR OFFICIAL PUBLICATION |
| Defendants, | ) | |
| and | ) | |
| FARMERS & MERCHANTS INSURANCE CO., | ) | |
| Defendant-Appellee. | ) | |

ORDER CORRECTING OPINION ON REHEARING AND DENYING REHEARING

The court's opinion, authored by OPALA, J., promulgated herein May 3, 1988, is hereby corrected as follows:

By striking on page 6 the present language in footnote 11 and substituting the following text:

11 "Fraud is either actual or constructive." 15 O.S. 1981 § 57. Although constructive fraud need not involve intent

to deceive and may be based on a negligent or innocent misrepresentation, it requires a breach of some legal or equitable duty. 15 O.S. 1981 § 59, infra; Faulkenberry v. Kansas City Southern Ry. Co., Okl. 602 P.2d 203, 206 [1979]. Accord Riley Hill Gen. Contr. v. Tandy Corp. 737 P.2d 595, 604 [Or. 1987] and Tatum v. Mid-Century Ins. Co., 730 S.W.2d 41, 43 [Tex.Civ.App. 1987].

The Silvers are precluded from recovery under the theories of constructive fraud and negligent misrepresentation because 1) we hold today that Farmers was under no statutory duty to explain UMC to them, 2) their relationship with Farmers was stricto sensu at arms' length and they did not stand vis-a-vis each other in any recognized form of "special relationship," see Faulkenberry, supra, at 205 n. 2, and 206, and 3) they submitted but one theory to the trial court, that of "waiver" or "breach-of-duty-to-inform," and are hence precluded from seeking relief on appeal under any other theory, see General Motors v. Okl. Cty. Bd. of Equal., Okl., 678 P.2d 233, 239 [1983]; Maryland Casualty Company v. Willsey, Okl., 380 P.2d 254, 259 [1963]; County of Okmulgee v. Robnett, Okl., 368 P.2d 502, 506 [1962]; and Cities Service Oil Company v. Merritt, Okl., 332 P.2d 677, 683 [1958].

The terms of 15 O.S. 1981 § 59 provides:

> "Constructive fraud consists:
>
> 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
>
> 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." [Emphasis added.]

By striking on page 10 the present language in footnote 34 and substituting the following text:



APPENDIX A

34 See, e.g., McCloe v. Utah Home Fire Ins. Co., 590 P.2d 941, 943 [Ariz.App. 1979] (At one time Arizona's UM statute required that uninsured motorist coverage "be called to the attention of the insured." Ariz.Rev.Stat. § 20-259.01 (1970). Both the duty to alert insureds to UMC's availability and the right to reject that coverage have been eliminated and replaced by mandatory minimal coverage. See Ariz.Rev.Stat. § 20-259.01 (1986) and Stuart v. Insurance Co. of North America, 730 P.2d 255, 258 and 260 [Ariz.App. 1986].); Dufresne v. Elite Insurance Company, supra note 33 at 353 (Rejection of UMC may be effected only by strict compliance with the specific statutory method.); Georgia Farm Bureau Mut. Ins. Co. v. Drexler, 326 S.E.2d 741, 743 [Ga. 1985] (The court declined to extend the statutory language and hence to require that insurer offer UMC to unnamed insureds.); Dairyland Ins. Co. v. Kelley, 352 S.E.2d 174, 176 [Ga.App. 1987] (Insured was entitled to UMC because rejection statements were not executed according to explicit statutory requirements.); Orolin v. Hartford Acc. & Indem. Co., 585 F.Supp. 97, 101 [N.D. Ill. 1984] (Insurers are required to supply no more than minimal information to apprise insureds of UMC's availability and to prompt further inquiry.); Brady v. University Underwriters Ins. Group, 307 N.E.2d 548, 551-552 [Ohio App. 1973] (Although the insured denied rejecting UMC and knowing of its availability, he undisputedly signed a rejection statement of his own free will. The rejection was held efficacious; absent a common-law misrepresentation claim, no material issues of fact existed. Brady is cited in Poots v. Motorist Ins. Companies, 526 N.E.2d 71, 73 [Ohio App. 1986]); Geisler v. Mid-Century Insurance Company, supra note 20 at 186 (Absent an express statutory requirement, the court declined to impose an affirmative duty upon insurers either to offer or to obtain a signed rejection of coverage that exceeds the legislatively mandated minimum.); but see Patrick v. Cherokee Ins. Co., 512 A.2d 24, 27 [Pa.Super. 1986]; and Vasquez v. Bankers Ins. Co., 502 So.2d 894, 896 [Fla. 1987] (Effective October 1, 1987 a named insured's signature on a statutory form gives rise to a conclusive presumption that "there was an informed, knowing rejection." See Fla. Stat. 1987 Ch. 627.727(1).).

In all other respects the Petition for Rehearing is denied and the May 3, 1988 opinion by OPALA, J., shall stand unmodified and unaffected by this correction order.

DONE BY ORDER OF THE SUPREME COURT THIS 28th DAY OF FEBRUARY, 1989.

CHIEF JUSTICE

Hargrave, C.J., Opala, V.C.J., Lavender, Simms, and Summers, JJ. Concur

Kauger, J. - Concur in Result

Hodges, Doolin and Wilson, JJ. - Dissent



APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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| RANDALL SILVER and MIKALA SILVER, individually, parents and next of kin of Michael R. Silver, deceased, minor child, | ) | FOR OFFICIAL PUBLICATION |
| Plaintiffs-Appellants, | ) | |
| vs. | ) | No. 64,879 |
| CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO., | ) | |
| Defendants, | ) | |
| and | ) | |
| FARMERS & MERCHANTS INSURANCE CO., | ) | |
| Defendant-Appellee. | ) | |

ALMA WILSON, Justice, dissenting:

The coverage termed "uninsured motorist coverage" is surely one of the most remarkable contractual undertakings ever devised, for uninsured motorist coverage does not insure uninsured motorists, (third parties); nor does it insure vehicles; rather, uninsured motorist coverage affords first-party coverage

to person(s) for whom the insurance contract is being written. It, thus, matches the complexity of the underlying policy and affords benefits on account of a wide variety of losses: medical expense, lost earnings, pain and suffering, including death. In this state, the indemnity language of uninsured motorist coverage, as mandated by 36 O.S. 1981 § 3636 is this:

> "The policy . . . **shall provide coverage . . .for the protection of persons insured** thereunder who are legally entitled **to recover** damages from owners or operators of uninsured motor vehicle and hit and run motor vehicles **because of bodily injury, sickness or disease, including death** resulting therefrom . . . ." [Emphasis added.]

There has been limited testing of the question how far the offeree must understand the terms of the coverage offered in order to decline it effectively. It has been held that the insurance company has no duty to explain uninsured motorist coverage to an insurance applicant unless the applicant asks for an explanation. Lopez v. Midwest Mutual Ins. Co., 223 So.2d 550 (Fla. App. 1969). This view comports with the rule in Oklahoma, as set forth in the early case of All American Bus Lines, Inc. v. Schuster, 199 Okl. 628, 189 P.2d 412 (1948), as follows:

> "Where a party signs a written agreement, in the absence of false representation or fraud, he is bound by it, although ignorant of its contents." [Emphasis added.

In the case now before this Court, Randall alleges that he telephone the agent's office for an explanation of uninsured motorist coverage. He further alleges that it was misrepresented to him that uninsured motorist coverage applies only to property damage caused by an uninsured motorist. He further averred that, relying upon the false explanation given to him, he signed the rejection statement which is the subject of this appeal. When Randall asked for the explanation about uninsured motorist coverage, it devolved upon the insurer to provide a complete and accurate explanation of uninsured motorist coverage, such that Randall would be able to make an intelligent and knowing decision whether to reject the coverage or not. There is always a duty to not state an untrue fact even when there is no duty to speak in the first instance. As stated in Gidley v. Chapple, 110 P. 1099 (Okla. 1910):

> "[A]lthough a party may keep absolute silence and violate no rule of law or equity, yet if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover the whole truth." [Emphasis added.]

Moreover, it is the law in Oklahoma that everyone has a duty to not injure or harm amother [sic] person, and such harm may stem from negligent misrepresentation. See, e.g., Oklahoma Constitution, Article II, §6; 76 O.S. 1981 § 1; 23 O.S. 1981 §3. Further, the insureds here are not precluded from recovery under a theory of constructive fraud because they stood within the Special Relationship of Insured to Insurer.

> An insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared and seldom understood by the insured. The parties are not similarly situated. The company and its representatives are expert in the field; the insured is not . . . . Allstate Insurance Co. v. Pietrash, 454 P.2d 106 (Nev. 1969). [Emphasis mine.]

Consequently, this Court has held that contracts of insurance are contracts of adhesion as a result of this uneven bargaining position. Wilson v. Travelers Insurance Co., 605 P.2d 1327 (Okla. 1980). This Court has also previously recognized the quasi-public nature of these particular adhesion contracts. In Christian v. American Home Assurance, 577 P.2d 899 (Okla. 1978), we stated:

> In Fletcher, [v. Western National Life Insurance Co., Cal.App.3d 376, 89 Cal.Rptr. 78, 47 A.L.R.3d 286 (1970)], the Court discussed the special relationship between

an insurer and its insured which gives rise to the duty of good faith and fair dealing. The Court observed that the industry has a quasi-public nature, that it involves the public interest . . . . The consumer has no bargaining power and no means of protecting himself from the kinds of abuses set forth . . . . The following discussion of this special relationship between an insurance company and its insured, is relevant here:

> ". . . To some extent this special relationship and the special duties take cognizance of the great disparity in the economic situations and bargaining abilities of the insurer and the insured . . . . To some extent the special relationship and duties of the insurer exist in recognition of the fact that the insured does not contract . . . to obtain a commercial advantage but to protect [himself]."
>
> [Emphasis added.]

Similarly, in the case of Egan v. Mutual of Omaha Insurance Co., 620 P.2d 141 (Cal. 1979), it is stated:

> The insurer's obligations are . . . rooted in their status as purveyors of a vital service labelled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . . [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of

> coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust . . . . Furthermore, the relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position.

I am accordingly convinced that a special fiduciary relationship does exist between the insureds and the insurer in this case, and that recovery may be available if the insureds can prove their allegations of constructive fraud and/or negligent misrepresentation.

Under the facts of the present case, even though the acts of the insurer's agent may or may not have been intended to deceive, it is obvious that the false representations were made with intent to induce the Plaintiffs to enter into the contract of waiver of UM benefits. Constructive fraud is defined at 15 O.S. 1981 § 59 as:

> 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or,

> 2. Any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Constructive fraud does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose; even an innocent or negligent misrepresentation may constitute "constructive fraud" where there is an underlying right to be correctly informed of the facts.

Additionally, with respect to the issue of constructive fraud, I must also register my disagreement with the majority's conclusion that the technical form of the pleadings in this case preclude consideration of the insured's claim on this basis. The Oklahoma Pleading Code provides:

> "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleadings or motions are required." 12 O.S. 1988 Supp., §2008(E)(1).

Lawsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleadings have been artfully drawn. This is a fundamental requirement of civil procedure, as evidenced by the mandate of 12 O.S. 1988 Supp., § 2008(F):

> "All pleadings shall be so construed as to do substantial justice."

The function of pleadings is narrow, i.e., to give "fair notice of

what the plaintiff's claim is and the grounds upon which it rests." Conley v Gibson, 355 U.S. 41, 47 (1957). This fundamental criteria has been met in this case. Inasmuch as Randall's claims were sufficiently pleaded and material facts remained in controversy when the trial court granted summary judgment, the trial court erred in granting the insurer's motion for summary judgment at that time. Therefore, this Court should remand this case to the trial court to determine the factual issues raised by Randall's allegations.

I have authorized to state that HODGES, J. and DOOLIN, J. join in this dissent.



APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

| | | |
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| RANDALL SILVER and MIKALA SILVER, Individually and as parents and next of kin of MICHAEL R. SILVER, Deceased, minor child, | ) | |
| Appellants, | ) | |
| v. | ) | No. 64,879 |
| FARMERS AND MERCHANTS INSURANCE COMPANY, | ) | |
| Appellee. | ) | |

O R D E R

IT IS HEREBY ORDERED that the opinion of this Court filed and promulgated in this cause on May 3, 1988, be and the same is ordered corrected as follows:

HODGES, J. and DOOLIN, J. should be shown as "Dissent" in lieu of "Concur" as written.

DONE BY ORDER OF THE SUPREME COURT this 27th day of February, 1989.

CHIEF JUSTICE

APPENDIX A

# APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| RANDALL SILVER and MIKALA SILVER, individually, parents and next of kin of Michael R. Silver, deceased, minor child, | ) | |
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| Defendants, | ) | |
| and | ) | |
| FARMERS & MERCHANTS INSURANCE CO., | ) | |
| Defendant-Appellee. | ) | |

Certiorari to the Court of Appeals, Division 3

In an action by the named insureds for the benefits of uninsured motorist coverage mandated by 36 O.S. 1981 § 3636, the District Court, Cleveland County, Preston Trimble, Judge, gave summary judgment for the insurer. The Court of Appeals reversed. Upon insurer's petition, certiorari is granted.

OPINION OF THE COURT OF APPEALS VACATED; TRIAL COURT'S SUMMARY JUDGMENT AFFIRMED.

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Randall Silver and Mikala Silver

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For Appellee,
Farmers & Merchants Insurance Co.

OPALA, J.

The dispositive issue is whether the terms of 36 O.S. 1981 § 3636[1] impose an affirmative duty upon insurers to provide an

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[1]The pertinent terms of 36 O.S. 1981 § 3636 provide:

> "(A) No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state . . . unless the policy includes the coverage described in subsection (B) of this section.
>
> (B) The policy . . . shall provide coverage . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall not be less than the amounts or limits prescribed for bodily injury or death for a policy meeting the requirements of Section 7-204 of Title 47, Oklahoma Statutes . . . provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured . . . .
> ***

explanation of uninsured motorist coverage [UMC] to the named insureds as an indispensable precondition for a statutorily effective rejection. We answer in the negative.

Randall and Mikala Silver [insureds or the Silvers] were named insureds of an automobile insurance policy with Farmers & Merchants Insurance Co. [insurer or Farmers], which was purchased in 1975. At that time Mikala Silver rejected uninsured motorist coverage for both her husband, Randall, and for herself by signing a statement which accompanied the insurance application.[2] The forms were believed to have been

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(F) The named insured shall have the right to reject such uninsured motorist coverage in writing, and except that unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer." [Emphasis added.]

[2]The 1975 rejection form provides in pertinent part:

"* * *

REJECTION OF UNINSURED MOTOR VEHICLE INSURANCE COVERAGE

* * *

The undersigned insured (and each of them) has been offered Uninsured Motorist Coverage, in accordance with the law, and does hereby reject such coverage, and does not choose to pay the additional applicable premium.

The coverage (rejected) provides for the

filled out by the insurance agent on Randall's instructions.[3]

The next year they received by mail from the same agent another application for insurance and again opted to exclude UMC from the Farmers policy.[4] Before both insureds signed

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protection of persons insured under this policy who would be legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury, sickness or disease, including death resulting therefrom.

This rejection continues in effect on all future renewal policies, renewal certificates, renewal notices and reinstatements or until such time as a premium is paid for Uninsured Motorist Coverage."

[3]The agency status, within the meaning of 36 O.S. 1981 § 1423, of the person with whom the insureds dealt -- whether as agent of Farmers or of the Silvers -- is of no consequence to the outcome of the instant appeal. This is so because (a) as we analyze the insureds' claim, its gravamen is the Silvers' allegedly flawed UMC rejection rather than the insurer's fraudulent misrepresentation and (b) our holding today rests solely on the view that the provisions of § 3636 cast no affirmative duty upon insurers to provide an explanation of UM coverage as an indispensable precondition for a statutorily effective rejection.

Neither need we address here the question -- raised by the Silvers -- whether the trial court erred in severing for trial their claim against Farmers from that against the tortfeasors.

[4]The pertinent portions of the rejection form Randall and Mikala Silver signed in 1976 are:

* * *

UNINSURED MOTORIST COVERAGE
(OKLAHOMA)

the rejection statement, Randall allegedly telephone the agent's office for an explanation of UM coverage. He claims to have been told by an unidentified person that UMC covers only property damage caused by an uninsured motorist. It is asserted that relying on that answer, Randall signed the form, instructed his wife to do the same, and mailed it back to the agent. Randall allegedly relied upon this information about UMC when he once more signed a rejection statement five years later and authorized his mother to sign two others on his

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The Oklahoma Legislature passed House Bill 1198 amending Section 3636 of the Uninsured Motorist law. This law requires Insurance Companies to offer Uninsured Motorist limits not to exceed your present Bodily Injury Liability limits you now carry. Please express your intent and acknowledge this offer by the Company by checking only one of the appropriate boxes below:

___ I desire Uninsured Motorist Coverage for the same limits I now have on my policy.

___ I desire Uninsured Motorist Coverage (not to exceed my present Bodily Injury Liability limits) and will remit the proper premium therefore.

Urgent--If you check this option, contact your Agent for the amount of additional premium to remit to the Company.

___ I reject Uninsured Motorist Coverage in its entirety and agree that said rejection is to be continuous until a premium is paid for Uninsured Motorist Coverage.



APPENDIX B

behalf.[5]

In late 1983 the Silvers' minor child was killed when struck by an uninsured motorist. The insureds sued and took judgment against the driver for a sum that exceeds the aggregate limits of public liability coverage provided by

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[5]All total, three rejections were effectuated since 1976 on identical written applications for automobile insurance. One of these was signed by Randall Silver in 1981, and two were signed, in 1982 and 1983, by his mother as an admitted agent. The pertinent terms of those rejection statements are:

"* * *

PROTECTION AGAINST UNINSURED MOTORIST COVERAGE

It is agreed that Uninsured Motorist Coverage under the Oklahoma Uninsured Motorist Act, Section 3636, Oklahoma Statutes has been offered to the undersigned insured (and each of them) and

___ I desire Uninsured Motorist Coverage with limits of liability of $_____/_____ Bodily Injury (not to exceed limits of Bodily Injury of policy)

___ I reject Uninsured Motorist Coverage in its entirety

If Uninsured Motorist Coverage is rejected, the rejection continues in effect on all future renewal policies, renewal certificates, renewal notices and reinstatements or until such time as a premium is paid for Uninsured Motorist Coverage.

* * *"

We need not and do not reach here the question whether § 3636 requires each named insured to reject UM coverage in writing, where more than one insured is named in a policy and at least one of them decides to reject UMC.

Farmers ($10,000.00 per person/$20,000.00 per occurrence) on each of three vehicles which were then owned by the Silvers. Admitting that UM coverage had been rejected and hence neither purchased nor included in any policy issued to them by Farmers, the Silvers nonetheless sued their insurer for UM benefits because of its failure to explain UM coverage to Randall Silver "properly, fully and adequately." They alleged Farmers is liable for all damages occasioned by their son's death because it failed to secure Randall's "knowing and intelligent" rejection of UMC.

Although, when urged to do so, the trial court refused to dismiss the claim, it postponed deciding whether the insureds had knowingly rejected UMC. After a hearing summary judgment was rendered for Farmers and the Silvers appealed.[6]

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[6]Neither the Silvers nor Farmers complains of procedural imperfections in the summary judgment process. The journal entry, which was signed by these parties' lawyers, indicates judgment was pronounced after "full file review and consideration of the briefs, deposition testimony, and affidavits." The absence from the record of a summary judgment motion is not fatal to the validity of the trial court's disposition because the terms of 12 O.S. Supp. 1984 § 2012(B) provide in pertinent part:

> ". . . If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by

Neither the legal theory of the Silvers' claim nor that on which the trial court rested its decision for Farmers is apparent from the record. If the trial court was correct under any theory this court's duty is to affirm the judgment.[7]

I

THE NATURE OF THE INSUREDS' CLAIM AGAINST FARMERS

The insureds' single pleading against Farmers is far more revealing in what it does not alleged than in what may be divined from its meager contents. Even though the Silvers averred that Farmers "improperly informed [Randall Silver] that [UMC] would only cover property damage if [the insureds] or their family members were involved in a collision with an uninsured motorist," they stated no common-law claim for bad

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the court, the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by the rules for summary judgment . . . ." [Emphasis added.]

[7]See Utica Nat. Bank and Trust v. Assoc. Prod., Okl., 622 P.2d 1061, 1066 [1981]. A pleader need not state the theory of recovery upon which he relies. Doss Oil Royalty Co. v. Texas Co., 192 Okl. 359, 137 P.2d 934, 939 [1943]; Oleck v. Fischer, 401 F.Supp. 651, 655 [S.D.N.Y. 1975].

faith, intentional misrepresentation or fraud.[8] They sought

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[8]The elements of a common-law action for fraud are: 1) a material misrepresentation, 2) knowingly or recklessly made, 3) with intent that it be relied upon, and 4) the party relying on the false statement suffers damages. Bras v. First Bank & Trust Co., Okl., 735 P.2d 329, 333 [1987]; D & H Co., Inc. v. Shultz, Okl. 579 P.2d 821, 824 [1978]. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." 12 O.S. Supp. 1987 § 2009(B).

An action for fraud may not be predicated on false statements when the allegedly defrauded party could have ascertained the truth with reasonable diligence. Sokolosky v. Tulsa Orthopaedic, Etc., Okl., 566 P.2d 429, 431 [1977]; Onstott v. Osborne, Okl., 417 P.2d 291, 293 [1966]. "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he had been deceived by the vendor's misrepresentations." Nowka v. West, 77 Okl. 24, 186 P. 220 [1919] (syllabus).

The Silvers themselves described their claim in a brief to the trial court as follows:

> "Plaintiffs [the insureds] do not allege that the Defendant [Farmers] acted in bad faith or that somehow Defendant intentionally misrepresented the coverage and terms available . . . . Although the Defendant's misrepresentations cannot be said to have been intentionally fraudulent, the discussions resulting in the rejectment by Plaintiffs of uninsured motorist coverage were nevertheless flawed inasmuch as said representations induced reliance on the part of Plaintiffs, Randall and Mikala Silver on false and improper representations of material facts." [Emphasis added.]

At common law, states in a brief were not treated as admissions. Today, under 12 O.S. Supp. 1984 § 2012(B), supra

neither coverage based on breach of contract or estoppel nor rescission of their rejection on grounds of mutual mistake of law or of act.[9] Their theory was grounded solely upon a

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note 6, if materials dehors the pleadings are tendered for consideration on a motion to dismiss, summary judgment procedure must be utilized. McElearney v. University of Ill., Etc., 612 F.2d 285, 290 n. 3 [7th Cir. 1979]; United Steelworkers v. American Internat'l Aluminum Corp., 334 F.2d 147, 149 [5th Cir. 1964] (briefs); Judge v. Johnston Warren Lines, Ltd., 205 F.Supp. 700, 702 [D. Mass. 1962] (statements of counsel at oral argument); White v. Peabody Const. Co., Inc., 434 N.E.2d 1015, 1018-1019 [Mass. 1982] (statements of counsel at oral argument establishing admissions). See also Womack v. City of Oklahoma City, Okl., 726 P.2d 1178, 1181 n. 8 [1986], for the use of admissions in a brief on appeal.

[9]"A contract is extinguished by its rescission." 15 O.S. 1981 § 232. "A party to a contract may rescind the same in the following cases only:

> "1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.
>
> 2. If through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part.
>
> 3. If such consideration becomes entirely void from any cause.
>
> 4. If such consideration, before it is rendered to him, fails in a material respect, from any cause; or,
>
> 5. By consent of all the other parties." 15 O.S. 1981 § 233.

breached "duty to inform". They alleged Randall Silver "lacked the requisite informed consent to sign a rejection" of UM coverage as a result of Farmers' failure to inform him that UMC provides benefits in the event bodily injuries are sustained from the negligence of an uninsured motorist. If the claim so stated were legally cognizable under the breach-of-duty-to-inform theory, though questions of material fact would be present, the insureds might be entitled to recover at least the minimum statutory UM protection.[10]

The insureds' action against Farmers appears to be neither ex contractu nor ex delicto. Recovery under the theory of constructive fraud is also unavailable to them.[11] Insofar as the Silvers' suit was pressed to establish their demand for uninsured motorist protection mandated by § 3636, the gravamen of the claim was breach of some duty to explain UM coverage as a precondition to a statutorily effective

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[10]36 O.S. 1981 § 3636(A), (B), and (F), supra note 1; Moser v. Liberty Mut. Ins. Co., Okl. 731 P.2d 406, 408 [1987].

[11]The Silvers are precluded from recovery under the theory of constructive fraud, because their relationship with Farmers was stricto sensu at arms' length; they did not stand vis-a-vis each other in any recognized form of "special relationship." See Faulkenberry v. Kansas City Southern Ry. Co., Okl. 602 P.2d 203, 205 n. 2, 206 [1979].

rejection.[12]

II

36 O.S. 1981 § 3636[13] IMPRESSES NO AFFIRMATIVE DUTY UPON INSURERS TO PROVIDE AN EXPLANATION OF UMC TO NAMED INSUREDS AS AN INDISPENSABLE PRECONDITION FOR A STATUTORILY EFFECTIVE REJECTION

Insurance is a contract. 36 O.S. 1981 § 102.[14] The relationship between the insured and insurer clearly is contractual in nature,[15] and we find nothing in § 3636 that alters the traditionally commercial setting in which insurance policies are purchased. Our UMC statute creates no fiduciary obligations, and its scheme is not consistent with consumer

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[12]See Oklahoma Natural Gas Co. v. Pack, 186 Okl. 330, 97 P.2d 768, 770 [1940].

"Waiver" is the voluntary, intentional relinquishment of a known right. The person against whom waiver is asserted as a defense must have had full knowledge of the existence of his rights as well as of all the material facts upon which those rights depended. Faulkenberry v. Kansas City Southern Railway Company, supra note 11 at 206-207 [1979].

[13]For the pertinent text of 36 O.S. 1981 § 3636, see supra note 1.

[14]The terms of 36 O.S. 1981 § 102 are:

> "'Insurance' is a contract whereby one undertakes to indemnity another or to pay a specified amount upon determinable contingincies [sic]."

[15]Christian v. Metropolitan Life Ins. Co., Okl., 566 P.2d 445, 448 [1977].

protection laws.[16] Rather, the essence of § 3636 is regulatory.[17] Its object is to provide UM protection only for those who do not reject it in writing.

No challenge is made here either to the legal sufficiency of Farmers' offer of increased UMC limits[18] or to the insureds' opportunity to reject UM coverage entirely. As offeror, Farmers had no contractual duty voluntarily to explain the terms of its offer or the advantages and disadvantages to

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[16]See, e.g., the Uniform Consumer Credit Code, 14A O.S. 1981 §§ 1-101 et seq. Its purposes include 1) furthering "consumer understanding of the terms of credit transactions," 14A O.S. 1981 § 1-102(2)(c), and 2) protecting consumers from unfair practices, 14A O.S. 1981 § 1-102(2)(d). Legislative intent is achieved primarily through disclosure requirements. See 14A O.S. 1981 §§ 2-301 and 2-302. Consumers are entitled to rescind transactions when creditors fail to comply. See 14A O.S. 1981 § 5-204. To insure greater protection, waiver of rights under the UCCC is generally prohibited. 14A O.S. 1981 § 1-107(1).

[17]36 O.S. 1981 § 109; State v. Okl. State Bd. of Property. Okl., 731 P.2d 394, 401 [1987]; Winston-Norris Co. v. King, 119 Okl. 109, 249 P. 319, 320 [1926]. The terms of 36 O.S. 1981 § 109 provide:

> "No person shall transact a business of insurance in Oklahoma without complying with the applicable provisions of this Code [36 O.S. 1981 §§ 101 et seq.]."

[18]Insurers are required by 36 O.S. 1981 § 3636(B) to offer increased limits of UMC. For the pertinent text of § 3636(B) see supra note 1.

procuring UM coverage.[19] Nothing in § 3636 makes it necessary for an insurer to make an express offer to exclude UMC from its policy anterior to the named insured's decision to opt out of the mandated protection.[20] All that is required by § 3636 for an effective rejection is a writing signed by the named insured.[21] An initial rejection suffices to relieve insurers of their statutory obligation to include UMC in subsequent renewals, unless the named insured requested the omitted coverage in writing.[22]

There are three separate sources which give rise to the

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[19]Generally, an offer is sufficient if its acceptance and nothing further will result in an enforceable contract. See Davenport v. Doyle Petroleum Corporation, 190 Okl. 548, 126 P.2d 57, 60 [1942] and Fry v. Foster, 179 Okl. 398, 65 P.2d 1224, 1226 [1937].

[20]See Geisler v. Mid-Century Ins. Co., 712 S.W.2d 184, 187 [Tex.App. 1986].

[21]36 O.S. 1981 § 3636(F), supra note 1.

[22]36 O.S. 1981 § 3636(F), supra note 1. Material changes in "renewals" create "new" policies of insurance and thus make it incumbent upon insurers to procure new rejections. Beauchamp v. Southwestern Nat. Ins. Co., Okl., 746 P.2d 673, 676 [1987]. Neither here nor below did any party to this appeal raise the question whether the Silvers' applications for insurance were for new policies or renewals.

creation of rights under Oklahoma law.[23] In the context of this case, the general principles of contracts, insofar as they apply to insurance policies, are instituted not only by general statute,[24] but also by the Insurance Code itself.[25] The common law supplements our statutes. It remains in full force unless it is clearly and expressly modified or abrogated by our constitution or by statute.[26] Because § 3636 contains no language which alters the basic, arms' length nature of the insured-insurer relationship, we decline to read into the UM

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[23]See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 [1985]; Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577-578, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 [1972]; 12 O.S. 1981 § 2, infra note 26.

[24]See note 26, infra.

[25]See 36 O.S. 1981 § 102, supra note 15.

[26]12 O.S. 1981 § 2; Davis v. Davis, Okl., 708 P.2d 1102, 1111 [1985]; State Mut. Life Assur. Co. of Amer. v. Hampton, Okl., 696 P.2d 1027, 1036 [1985] (Opala, J., concurring). The terms of 12 O.S. 1981 § 2 provide:

> "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general Statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object." [Emphasis added.]

statute a duty charging insurers with the responsibility of detailed and formalistic explanation as an indispensable precondition for securing from the named insured a statutorily effective rejection of uninsured motorist coverage.[27] Where no duty exists, there can be no right.[28] Since Farmers stood obligated neither by contract nor by statute to apprise the insureds of all the facts about UMC, there was no right subject to waiver. We hold that no disputed material issue of fact came to be tendered below. Summary judgment must

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[27]To hold that insurers must give named insureds a judicially prescribed cluster of information as a prerequisite for a valid rejection would be to transpose their contractual relationship into one that requires Miranda-like treatment of insureds by their insurance providers. See Johnson v. Concord Mutual Insurance Co., 300 A.2d 61, 66 [Penn. 1973] (Pomeroy, J., concurring), citing Miranda v. Arizona, 383 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 [1966].

[28]Hall Jones Oil Corporation v. Claro, Okl., 459 P.2d 858, 861-862 [1969]; Oklahoma Natural Gas Co. v. Pack, supra note 12. See also W. Hohfeld, Fundamental Legal Conceptions (1923) at 78, quoting from Leake, Law of Property in Land (1st ed., 1874) at 1-2:

> "'Rights against persons, jura in personam . . . have for their subject an act or performance of some certain determinate person, as the payment of money, the delivery of goods and the like. A right of this kind imports the correlative positive legal duty in the determinate person to act in the manner prescribed. It depends for its exercise or enjoyment upon the performance of that duty, and is secured by the legal remedies provided for a breach of performance . . . .'" [Emphasis theirs.]

hence be affirmed.[29]

The result reached today is not inconsistent with that portion of Hicks v. State Farm Mutual Automobile Insurance Company[30] which dealt with the validity of a named insured's UMC rejection.[31] When called upon to carry out the public

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[29]Today's holding is grounded on the conclusion that under the single theory of recovery found applicable to their claim, the Silvers cannot prove any set of facts that would have entitled them to relief against Farmers. See 12 O.S. Supp. 1984 § 2012(B)(6); Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 [1957]; committee Comment to 12 O.S. Supp. 1984 § 2012. No harm resulted from the trial court's summary judgment disposition, because the evidentiary materials on record support its ruling.

[30]Okl., 568 P.2d 629, 633 [1977].

[31]In Hicks v. State Farm Mutual Automobile Insurance Company, supra note 30, as in the case at bar, there was no evidence of fraud; we held the rejection efficacious. That portion of Hicks which dealt with the issue whether the policy was a "renewal," has been overruled. See Beauchamp v. Southwestern National Insurance Company, supra note 22.

The parties to this appeal, as this court did in Hicks, refer to the Pennsylvania case, Johnson v. Concord Mutual Insurance Co., supra note 27, for the applicability of waiver to UMC rejections. We find Johnson inapposite here. There the insured sought reformation of his policy. The action was hence grounded on contract principles rather than on a breach of some statutory duty. We note also that the statute under scrutiny in that case has been amended. In Pennsylvania owners of automobiles for private use no longer have the right to reject UMC; that right is limited to owners and operators of commercial vehicles. See Johnson v. Concord Mutual Insurance Co., supra note 27 at 64, n.4.

policy mandate of our UM statute, this court has consistently respected the contractual nature of the insured-insurer relationship and the applicability of contract principles.[32] The rules of waiver and estoppel do not afford a gauge for measuring the efficacy of a UM rejection.[33] Like other jurisdictions before us, we refuse today to impose supra-statutory duties upon insurers by judicial fiat.[34]

COURT OF APPEALS' OPINION VACATED; TRIAL COURT'S SUMMARY JUDGMENT AFFIRMED.

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[32]See, e.g., Moser v. Liberty Mutual Insurance Company, supra note 10 at 410 n. 16; Uptegraft v. Home Ins. Co., Okl., 662 P.2d 681, 683 [1983]; Keel v. MFA Insurance Company, Okl., 553 P.2d 153, 155 [1976].

[33]See Dufresne v. Elite Insurance Company, 103 Cal.Rptr. 347, 353 [Cal.App. 1972].

[34]See, e.g., McCloe v. Utah Home Fire Ins. Co., 590 P.2d 941, 943 [Ariz.App. 1979] (Arizona's UM statute no longer requires that UMC "be called to the attention of the insured," and the right to reject UM coverage has been eliminated. See 1972 Ariz. Sess. Laws, Ch. 157, § 1.); Dufresne v. Elite Insurance Company, supra note 33; Drexler v. Georgia Farm Bureau Mut. Ins. Co., 320 S.E.2d 854, 857 [Ga. App. 1984]; Orolin v. Hartford Acc. & Indem. Co., 585 F.Supp. 97, 101 [N.D. Ill. 1984]; Brady v. Universal Underwriters Ins. Group, 307 N.E.2d 548, 551-552 [Ohio App. 1973]; cf. Dairyland Ins. Co. v. Kelley, 352 S.E.2d 174, 176 [Ga. App. 1987]; Geisler v. Mid-Century Insurance Company, supra note 20 at 186; accord, Martin v. 20th Century Ins. Co., 201 Cal.Rptr. 22, 27 [Cal.App. 1984]; but see, e.g., Patrick v. Cherokee Ins. Co., 512 A.2d 24, 27 [Pa. Super. 1986].



APPENDIX B

DOOLIN, C.J., and HARGRAVE, V.C.J., and HODGES, LAVENDER, SIMMS and SUMMERS, JJ., concur;
KAUGER, J., concurs in result;
WILSON, J., dissents.



APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| RANDALL SILVER and MIKALA SILVER, individually, parents and next of kin of Michael R. Silver, deceased, minor child, | ) | FOR OFFICIAL PUBLICATION |
| Plaintiffs-Appellants, | ) | |
| vs. | ) | No. 64,879 |
| CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO., | ) | |
| Defendants, | ) | |
| and | ) | |
| FARMERS & MERCHANTS INSURANCE CO., | ) | |
| Defendant-Appellee. | ) | |

ALMA WILSON, Justice, dissenting:

The coverage termed "uninsured motorist coverage" is surely one of the most remarkable contractual undertakings ever devised, for uninsured motorist coverage does not insure uninsured motorists, (third parties); nor does it insure vehicles; rather, uninsured motorist coverage affords first-party coverage

to person(s) for whom the insurance contract is being written. It, thus, matches the complexity of the underlying policy and affords benefits on account of a wide variety of losses: medical expense, lost earnings, pain and suffering, including death. In this state, the indemnity language of uninsured motorist coverage, as mandated by 36 O.S. 1981 § 3636 is this:

> "The policy . . . **shall provide coverage . . .for the protection of persons insured** thereunder who are legally entitled **to recover** damages from owners or operators of uninsured motor vehicle and hit and run motor vehicles **because of bodily injury, sickness or disease, including death** resulting therefrom . . . ." [Emphasis added.]

There has been limited testing of the question how far the offeree must understand the terms of the coverage offered in order to decline it effectively. It has been held that the insurance company has no duty to explain uninsured motorist coverage to an insurance applicant unless the applicant asks for an explanation. Lopez v. Midwest Mutual Ins. Co., 223 So.2d 550 (Fla. App. 1969). This view comports with the rule in Oklahoma, as set forth in the early case of All American Bus Lines, Inc. v. Schuster, 199 Okl. 628, 189 P.2d 412 (1948), as follows:

> "Where a party signs a written agreement, in the absence of false representation or fraud, he is bound by it, although ignorant of its contents." [Emphasis added.

In the case now before this Court, Randall alleges that he telephone the agent's office for an explanation of uninsured motorist coverage. He further alleges that it was misrepresented to him that uninsured motorist coverage applies only to property damage caused by an uninsured motorist. He further averred that, relying upon the false explanation given to him, he signed the rejection statement which is the subject of this appeal. In my opinion, when Randall asked for the explanation about uninsured motorist coverage, it devolved upon the insurer to provide a complete and accurate explanation of uninsured motorist coverage, such that Randall would be able to make an intelligent and knowing decision whether to reject the coverage or not. Inasmuch as Randall's claims remained in controversy when the trial court granted summary judgment, the trial court erred in granting the insurer's motion for summary judgment at that time. Therefore, this Court should remand this case to the trial court to determine the factual issues raised by Randall's allegations.



APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| RANDALL SILVER and MIKALA SILVER, individually, parents and next of kin of Michael R. Silver, deceased, minor child, | ) | |
| Plaintiffs-Appellants, | ) | |
| vs. | ) | No. 64,879 |
| CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO., | ) | |
| Defendants, | ) | |
| and | ) | |
| FARMERS & MERCHANTS INSURANCE CO., | ) | |
| Defendant-Appellee. | ) | |

CORRECTION ORDER

The opinion by Opala, J., promulgated herein May 3, 1988, is hereby corrected as follows:

By striking at page 7 in footnote 16, on the 4th line from the top of the footnote, the following consecutive sentences:

> Legislative intent is achieved primarily through disclosure requirements. See 14A O.S. 1981 §§ 2-301 and 2-302. Consumers are entitled to rescind transactions when creditors fail to comply. See 14A O.S. 1981 §§ 5-204.

and substituting in their place the following text:

> Disclosure requirements are a primary means to achieve legislative intent. See, e.g., 14A O.S. 1981 §§ 2-301, 2-302 and 5-204.

In all other respects the opinion by Opala, J., shall remain unaffected by this correction order.

DONE BY ORDER OF THE SUPREME COURT THIS 13th DAY OF MAY, 1988.

Acting Chief Justice

# APPENDIX C

THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

Division No. 3

| | | |
|---|---|---|
| RANDALL SILVER and MIKALA SILVER, Individually and as Parents and Next of Kin of Michael R. Silver, Deceased, | ) | |
| Appellants, | ) | |
| versus | ) | No. 64,879 |
| FARMERS & MERCHANTS INSURANCE CO., | ) | |
| Appellee. | ) | |

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE PRESTON TRIMBLE, JUDGE

Plaintiffs appeal trial courts [sic] order sustaining Insurance Company's motion for summary judgment finding policy did not provide for uninsured motorist coverage for Plaintiffs.

REVERSED AND REMANDED

Clifton D. Naifeh, and
Jeffrey A. Glendening,
Oklahoma City, Oklahoma, For Appellants,

Jim W. Lee,
Oklahoma City, Oklahoma, For Appellee.

Opinion by Carol M. Hansen, Presiding Judge:

APPENDIX C

The minor child of Randall and Mikala Silver (Plaintiffs) was struck and killed by an automobile driven by an uninsured motorist. Plaintiffs filed the present action for wrongful death and took a default judgment against the driver. In addition a jury returned a verdict against the owner of the vehicle, also uninsured, for $1,172,180.37 actual and $2,000,000 punitive damages. Prior to trial Plaintiffs amended their petition to include Farmers & Merchants Insurance Co., Appellees herein, (Insurance Company) seeking judgment against them for uninsured motorist coverage under three policies of insurance. Insurance Company answered denying coverage stating Plaintiffs had opted in their application to reject such coverage.

The trial was bifurcated. All issues against all defendants were tried except the issue of coverage under Insurance Company's policy. Subsequently the trial court granted Insurance Company's motion for summary judgment. Plaintiffs appeal that order.

Plaintiffs initially argue the trial court should not have bifurcated the trial but rather tried the liability of the other defendants in conjunction with the liability of Insurance Company for uninsured motorist coverage. This argument is clearly without merit. When there is no question of coverage

being applicable, and the only question is liability of the uninsured motorist and the amount of uninsured coverage, the Supreme Court allows an insured to join his insurance carrier as a party defendant.[1] However, joinder is certainly not compulsory. The right to recover under uninsured motorist coverage is based on the insured's right in contract rather than in the insured's right in tort against the motorist. Insurance Company is involved as a party to a contract not as the alter ego of the tortfeasor.[2] The issues involved in Plaintiffs' action against Insurance Company are totally different from those involved in the actual liability of the uninsured motorist.

In their petition Plaintiffs alleged at the time they purchased the policies from Insurance Company, its agent failed to inform them uninsured motorist coverage would cover Plaintiffs and their deceased son if damage was caused by an uninsured motorist or motor vehicle. They submit Insurance Company improperly informed them uninsured motorist insurance would cover only property damage in such an instance. They

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[1]Keel v. M.F.A. Insurance Company, 553 P.2d 153 (Okla. 1976).

[2]Bill Hodges Truck Co. v. Humphrey, 704 P.2d 94 (Okla. App. 1984).

alleged such failure properly and fully to inform them of the available coverage induced them to sign a rejection of such insured [sic] motorist coverage. Thus they lacked the requisite informed consent to sign the rejection. Because this information was not given them Plaintiffs submitted they were entitled to judgment against Insurance Company for damages.

36 O.S. 1981 §3636 provides in pertinent part:

> (A) No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection (B) of this section.
>
> (B) The policy referred to in subsection (A) of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom.
>
> . . . .
>
> (F) The named insured shall have the right to reject such uninsured motorist coverage in writing, and except that unless the named insured requests such coverage

> in writing such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

The purpose of an uninsured motorist provision in an insurance contract is to protect the insured from the effects of personal injury resulting from an accident with another motorist who carries no insurance.[3] The public policy intent espoused by the Legislature in the above statute is clearly expressed. Every automobile liability policy issued in this state must provide uninsured motorist coverage for persons insured thereunder.[4] Coverage may be rejected by the insured under this statute. However, such rejection in order to comport with the public policy expressed must be knowingly and voluntarily made.

By affidavit and deposition testimony, Plaintiff Randall Silver stated he first applied for insurance in 1976. Insurance Company's agent mailed him the forms. He stated he read the application but was unable to comprehend its meaning. He

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[3]Uptegraft v. Home Insurance Company, 662 P.2d 681 (Okla. 1983).

[4]State Farm Mutual Auto Insurance Company v. Wendt, 708 P.2d 581 (Okla. 1985).

called his agent and asked what uninsured motorist coverage meant. He stated he was informed by the agent that uninsured motorist insurance covered only property damage if family members or Plaintiffs were involved in a collision with an uninsured motorist. It was in reliance on that information that he signed the form and instructed his wife to do the same.

The initial form signed by Plaintiffs stated:

UNINSURED MOTORIST COVERAGE
(OKLAHOMA)

The Oklahoma Legislature passed House Bill 1198 amending Section 3636 of the Uninsured Motorist law. This law requires Insurance Companies to offer Uninsured Motorist limits not to exceed your present Bodily Injury Liability limits you now carry. Please express your intent and acknowledge this offer by the Company by checking only one of the appropriate boxes below:

___ I desire Uninsured Motorist Coverage for the same limits I now have on my policy.

___ I desire Uninsured Motorist Coverage (not to exceed my present Bodily Injury Liability limits) and will remit the proper premium therefore.
Urgent - - If you check this option, contact your Agent of the Company for the amount of additional premium to remit to the Company.

___ I reject Uninsured Motorist Coverage in its entirety and agree that said rejection is to be continuous until a premium is paid for Uninsured Motorist Coverage.



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After that time there was no further information provided. Plaintiffs had no further discussion with Insurance Company regrading uninsured motorist coverage. Each year they were mailed a new application. Plaintiffs did not read the documents but merely signed where told. In subsequent years and for different vehicles the rejection form changed to the following wording:

PROTECTION AGAINST UNINSURED MOTORIST INSURANCE

> It is agreed that Uninsured Motorist Coverage under the Oklahoma Uninsured Motorist Act, Section 3636, Oklahoma Statutes has been offered to the undersigned insured (and each of them) and
>
> ___ I desire Uninsured Motorist Coverage with limits of liability of $_____/_____ Bodily Injury (not to exceed limits of Bodily Injury of policy).
>
> _X_ I reject Uninsured Motorist Coverage in its entirety.
>
> If Uninsured Motorist Coverage is rejected, the rejection continues in effect on all future renewal policies, renewal certificates, renewal notices and reinstatements or until such time as a premium is paid for Uninsured Motorist Coverage.

Insurance Company argues and the trial court apparently agreed the signed rejection form is binding as a matter of law and no question of fact may arise as to whether or not the rejection was intelligently and knowingly made. It is true,



APPENDIX C

absent unusual circumstances, an insured cannot claim ignorance of the contents of a contract he signed. Certainly an insured's signature on a rejection form raises a presumption he knowingly and intelligently rejected coverage. However, such presumption is not a conclusive presumption but rather a rebuttable one.

The fact Oklahoma statutes require uninsured motorist coverage be offered to every person buying automobile liability insurance and a written refusal is required to substantiate rejection of such coverage indicates a very clear legislative intent in favor of coverage.[5] In harmony with the view the statute evolves from public policy considerations, it must be broadly and liberally construed to accomplish this purpose.[6] As such parole evidence may be admitted to prove or disprove the rejection was knowingly and intelligently made.

The Supreme Court has addressed this problem in Hicks v. State Farm Mutual Auto Insurance Co., 568 P.2d 629 (Okla. 1977), cited by both parties in support of their views. In that decision the Supreme Court considered evidence leading up to

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[5]Chambers v. Walker, 653 P.2d 931 (Okla. 1982).

[6]Johnson v. Concord Mutual Insurance Company, 300 A.2d 61 (Penn. 1973).

the insured's signature rejecting uninsured motorist coverage. In Hicks the insurance company sent to Appellant for his signature the following instrument:

> "The Oklahoma Legislature had enacted legislation requiring all automobile liability insurance policies in the State to provide Uninsured Automobile Coverage (Coverage U) unless rejected in writing by the policyholder. This legislation also broadens the protection provided by Uninsured Automobile Coverage.
>
> "This coverage protects you in the event of bodily injury liability damages sustained by you, your family, or your passengers in an accident for which an unidentified or uninsured driver is legally liable. * * *
>
> "In accordance with the new law, State Farm is providing Uninsured Automobile Coverage for all Oklahoma auto liability policies. If you are not now carrying this coverage, your enclosed premium notice states: 'Coverage U Added' and indicates the limits of liability. The semi-annual premium for this additional coverage is $3.00 for $10,000/$20,000 limits or $2.70 for $5,000/$10,000 limits and is included in the total Amount Due. Payment of the total Amount Due automatically adds Coverage U to your automobile policy, effective with your policy's renewal date."

In the last paragraph of the explanatory statement the following language appeared:

> "If you presently do not have Coverage U, State Farm strongly recommends that you accept this important additional protection.

* * * * *



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"If You Want This
IMPORTANT COVERAGE

Pay the entire AMOUNT DUE shown on your Premium Notice and place this endorsement with your policy. This will automatically make Uninsured Automobile Coverage a part of your auto liability policy."

It further provided:

"If You Do Not Want
UNINSURED AUTOMOBILE COVERAGE . . .
Please follow these three steps:

1. Complete and sign the Notice of Rejection (at the right), and . . .

2. Subtract $2.70 from the total Amount Due on the enclosed premium notice if you have $5,000/$10,000 Bodily Injury Liability limits; $3.00 if you have $10,000/$20,000 Bodily Injury Liability limits;

3. Return the amount that is left as your premium payment enclosing your signed Notice of Rejection."

The notice of rejection also contained this language:

"NOTICE OF REJECTION
UNINSURED MOTORIST COVERAGE

"The undersigned, an insured named in the policy, hereby rejects the provisions covering damage caused by an uninsured motor vehicle under a policy of bodily injury liability insurance on the following described car: * * *."

The explanation included in Plaintiffs' policy application was in no way comparable to the express provisions of the Hicks policy as shown above. In Hicks as in this case Plaintiffs relied heavily on Johnson v. Concord Mutual



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Insurance Company, 300 A.2d 61 (Penn. 1973). The printed form containing the purported waiver of uninsured motorist coverage in Johnson was quite similar to the one contained in Insurance Company's application herein. The Hicks court distinguished Johnson but did not reject or disapprove its holdings. It found the Johnson policy did not contain the recommendation that the insured accept the tendered uninsured motorist coverage. Neither did the Johnson form provide an extensive explanatory statement as to what the insured was rejecting. Furthermore, in Hicks the Appellant signed the rejection, dated it and in conformity with an intent to reject the coverage subtracted the $3.00 charge for the uninsured motorist coverage from the total premium and returned it to the insurance company. The Hicks Court found nothing to indicate Appellant's signature on the rejection was not knowingly and intelligently made.

In the present case the rejection did not explain what uninsured motorist coverage was nor what it costs. Plaintiff testified Company's agent told him it was for property damage. There was no recommendation it be purchased and the cost was not mentioned. Whether the signature was intelligently and

voluntarily made is certainly a question of fact under these circumstances.

Because of the potential harsh ramifications of an election by an insured to refuse uninsured motorist coverage most courts have strictly and narrowly construed the requirement a waiver must be explicitly explained. A binding rejection of coverage must be based on such explanation.[7] In Maher v. All Nations Insurance Coverage, 340 NW.2d 675 (Minn. App. 1983) the Court held the issue of whether the insurer has made an adequate offer of uninsured motorist coverage to an insured is a question of fact. Such offer must be a meaningful one. The insured must be given enough information to make an intelligent decision. The Court voiced four basic concerns in determining whether the Insurance Company made a meaningful offer: 1) the method of the offer must be commercially reasonable; 2) the limits of the optional coverage must be specified, not merely offered in general terms; 3) the insurer must intelligently advise the insured of the nature of the

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[7]Wilson v. National Indemnity Company, 302 So.2d 141 (Fla. App. 1974); Tibbals v. State Farm Mutual Auto Insurance Co., 370 NW.2d 679 (Minn. App. 1985); Johnson v. Concord Mutual Insurance Co., 300 A.2d 61 (Penn. 1973); Dufresne v. Elite Insurance Company, 26 Cal. App. 3d 916, 103 Cal. Rptr. 347 (1972).

optional coverage; and, 4) insurer must advise insured that the coverage is available at a relatively modest increase in premium. We find these concerns to be reasonable and direct the trial court to apply them to the present case.

The trial court erred in ruling as a matter of law there was knowing and informed rejection of uninsured motorist coverage by Plaintiffs. Their assertions clearly raise a question of fact. The trial court must conduct a case by case analysis of each instance. If there are facts in controversy these should be reviewed by the trier of fact to determine whether or not there was a knowing and informed rejection of uninsured motorist coverage. As in Johnson the clarity of the explanation of the coverage, the ability of the insured to comprehend the explanation, the amount of the premium, an the purpose of the coverage are all facts which must be considered in making this determination.

A review of the rejection forms signed by Plaintiff reveal very little information. The insured could either accept or reject uninsured motorist coverage. There was no explanation as to what was covered, no explanation as to why an insured might need uninsured motorist coverage, and no explanation as to the amount of coverage or the cost. Therefore, the only



APPENDIX C

possible way Plaintiffs could have learned of their rights under this statute is from representatives of the Insurance Company. They stated no such explanation was given. Insurance Company argues the facts imply Plaintiffs rejected coverage. Plaintiffs claim the facts imply they did not. Clearly this is an issue of fact.[8] The record reveals facts supporting legitimate inferences favoring Plaintiffs well pleaded theory. The trial court's order granting Insurance Company's motion for summary judgment must be reversed.[9]

Accordingly, we REVERSE and REMAND FOR FURTHER PROCEEDINGS.

HUNTER, J. and BAILEY, J. concur.

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[8]See Wilson v. National Indemnity Company, supra, n.7.

[9]Crisp, Courtemanche, Meador & Associates v. Medler, 663 P.2d 388 (Okla. App. 1983).



APPENDIX C

# APPENDIX D

IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

| | | |
|---|---|---|
| RANDALL SILVER and MIKALA SILVER, Individually, Parents and Next of Kin of Michael R. Silver, Deceased, Minor Child, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | No. C-84-781T |
| CHRISTINE ANNETTE SLUSHER a/k/a CHRISTINE ANNETTE STINGLEY, KEN BECKNELL, Individually and d/b/a COWBOY COUNTRY, RICKY B. HENDERSON, and FARMERS & MERCHANTS INSURANCE CO., | ) | |
| Defendants. | ) | |

JOURNAL ENTRY

On the 1st day of July, 1985, the above-captioned case came on for argument and consideration of defendant Farmers and Merchants Insurance Company's motion for summary judgment; the parties plaintiff were present by and through their attorney of record, Clifton D. Naifeh, and defendant Farmers and Merchants Insurance Company was present by and through its attorney of record, Jim W. Lee; said defendant had heretofore filed a motion to dismiss, which was overruled on June 4, 1985, with the Court reserving the issue of whether

plaintiffs made a knowing waiver of uninsured motorist coverages for submission upon stipulation, deposition, and briefs on July 1, 1985; that argument was presented, at the conclusion of which, after being fully advised in the premise, after full file review and consideration of the briefs, deposition testimony, and affidavits of the parties, and being fully advised in the premises, the Court found that the defendant, Farmers and Merchants Insurance Company's motion for summary judgment should be sustained, all with exceptions allowed plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that defendant Farmers and Merchants Insruance [sic] Company's motion for summary judgment should be and the same is hereby sustained, and that the judgments be placed of record in this case.

_____
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM AND CONTENT:

_____
Clifton D. Naifeh for the
Plaintiffs, Randall Silver
and Mikala Silver

Jim W. Lee for the Defendant
Farmers and Merchants
Insurance Company



APPENDIX D